UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLISON SCOTT, Individually and as the Personal Representative of the Estate of Derrick Davis,

Plaintiff,

v.

DISTRICT OF COLUMBIA, et al.,

Defendants.

Civil Action 98-01645 (HHK)

MEMORANDUM AND ORDER

This case arises from the death of an inmate, Derrick Davis, a District of Columbia ("District") prisoner who was killed by another inmate after both were transferred to the Northeast Ohio Correctional Center ("NOCC" or "Ohio facility") pursuant to a contract between the District and the Corrections Corporation of America ("CCA"). Plaintiff, Allison Scott, the mother of Mr. Davis' only child, sues the District, Margaret Moore, former Director of the District of Columbia Department of Corrections ("Department of Corrections"), and CCA in her individual capacity and as personal representative of Mr. Davis' estate. In her first amended complaint, plaintiff alleges the following causes of action: (1) COUNT I--Deprivation of Eighth Amendment right to be free from cruel and unusual punishment, actionable under 42 U.S.C. § 1983; (2) COUNT II--Wrongful Death, under Ohio Rev. Code Ann. §

2125.01, *et seq.*; (3) COUNT II [sic]--Survival Act, under D.C. Code § 12-101; (4) COUNT III--Negligent Supervision; and (5) COUNT IV--Negligent Infliction of Emotional Distress.

Before the court are defendants' motions to dismiss plaintiff's amended complaint. Upon consideration of the motions, plaintiff's oppositions thereto, and the record of this case, the court concludes that the motion of defendant Moore, should be granted in part, the motion of CCA should be granted in part, and the motion of the District should be denied.

I. BACKGROUND

Derrick Davis, a District prisoner, was killed by another inmate, Richard Johnson, while housed at NOCC, a private prison facility owned and operated by CCA. Compl. ¶¶ 2, 35. Mr. Davis and Mr. Johnson were housed at NOCC pursuant to an agreement between CCA and the Department of Corrections that was negotiated in late 1996 and formalized in July 1997 as a contract between CCA and the District. *Id.* ¶¶ 2, 16, 17, 33. The District entered into this agreement with CCA because the District's prison system was in crisis, with violence at "epidemic proportions." *Id.* ¶¶ 12-13 (quoting testimony of Margaret Moore). Under the contract, the Department of Corrections retained the right to inspect the Ohio facility to ensure that CCA maintained appropriate levels of care and discipline. *Id.* ¶ 18.

The contract provided that the District was to deliver to CCA's Ohio facility 1500 medium-security District prisoners; no maximum security prisoners were to be

incarcerated at the Ohio facility. *Id.* ¶ 17, 19. The first prisoners that the Department of Corrections transferred to the Ohio facility were approximately 200 of the District's "most 'violent,' 'assaultive' and 'disruptive' prisoners . . . ." *Id.* ¶¶ 22-23.[1] Subsequently, the Department of Corrections transferred to the Ohio facility 843 additional District prisoners, who were selected because they "had a history of violent and assaultive behavior." *Id.* ¶ 24. The Department of Corrections also transferred to the Ohio facility 272 prisoners from the District's Maximum Security Facility. *Id.* ¶ 27. The Department of Corrections transferred these prisoners under the direction of defendant Margaret Moore, its former Director. *Id.* ¶¶ 23-24, 27.

Derrick Davis and his killer, Richard Johnson, were among the prisoners that the Department of Corrections transferred to NOCC. *Id.* ¶¶ 2, 33. At the time of his transfer, Richard Johnson was classified as a maximum-security prisoner. *Id.* ¶ 33. Mr. Johnson had been convicted of three murders, including one committed while incarcerated. *Id.* Mr. Johnson stabbed a corrections officer in 1995. *Id.* In July 1997, while incarcerated at NOCC, Mr. Johnson stabbed another inmate, and in November 1997, he assaulted a corrections officer. *Id.* Despite this history of violence, of which defendants were aware, Mr. Johnson was housed in the general

---

[1] These prisoners had previously been transferred from the District's Occoquan facility to jails in Virginia when the Department of Corrections had learned that the Occoquan prisoners planned to take over Occoquan's administrative building. The Virginia jails then demanded that the prisoners be removed due to violence or potential violence. Compl. ¶¶ 22-23.

population at NOCC. *Id.* ¶ 34. In February 1998, Mr. Johnson stabbed and killed Mr. Davis, a medium-security prisoner. *Id.* ¶ 35; *see also id.* at 8.

Plaintiff alleges that Mr. Davis' death resulted from defendants' "wrongful acts and omissions." *Id.* ¶ 1. Specifically, plaintiff alleges, *inter alia*, that defendants "failed to establish and maintain a classification system that protects inmates from violence from other inmates." *Id.* ¶ 32. The District delivered, and CCA accepted, maximum-security prisoners for incarceration at NOCC, a facility designed to hold only medium-security prisoners. *Id.* at 8. Defendants "fail[ed] to assure the complete and continuous separation of inmate Johnson from Mr. Davis and all other medium security prisoners . . . ." *Id.* Defendants "fail[ed] to assure" that the Ohio facility's staff was properly trained. *Id.* Defendants "fail[ed] to comply with the recognized standards of care applicable to the management and operation of a correctional facility . . . ." *Id.*

II. LEGAL STANDARDS

Defendants move to dismiss the case in part under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted, and in part under Federal Rule of Civil Procedure 12(b)(1), for lack of subject-matter jurisdiction. In evaluating a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, a court must accept the allegations in the complaint as true. *See, e.g., Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 (D.C. Cir. 1999). All reasonable inferences must be drawn in favor of the plaintiff, and a court should only dismiss a complaint for failure to state a

claim "'if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Id.* (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Price v. Crestar Secs. Corp.*, 44 F. Supp. 2d 351, 353 (D.D.C. 1999). In ruling on a 12(b)(6) motion, a court "does not test whether the plaintiff will prevail on the merits, but instead whether the claimant has properly stated a claim." *Price*, 44 F. Supp. 2d at 353. If a court considers materials outside the pleadings in ruling upon a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must convert the motion to dismiss into a motion for summary judgment. Fed. R. Civ. P. 12(b); *see also Haase v. Sessions*, 835 F.2d 902, 905-06 (D.C. Cir. 1987).

In ruling upon a motion to dismiss brought under Rule 12(b)(1), a court must construe the allegations in the Complaint in the light most favorable to the plaintiff. *See, e.g., Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Additionally, a court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case. *See, e.g.*, *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Haase*, 835 F.2d at 906; *Hohri*, 782 F.2d at 241; *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 21 F. Supp. 2d 47, 55 (D.D.C. 1998); *Bayvue Apts. Joint Venture v. Ocwen Fed'l Bank*, 971 F. Supp. 129, 132 n.5 (D.D.C. 1997).

In opposing defendants' motions to dismiss, plaintiff presented the court with materials outside the pleadings. The court has excluded all such materials from its consideration of whether or not plaintiff has stated a claim upon which relief may be granted. Thus, the court will not convert the present motions to motions for summary judgment. The court finds it unnecessary to consider materials outside the pleadings in determining whether it has jurisdiction to hear this case.

III. ANALYSIS

A. District of Columbia's Motion to Dismiss

1. Custody

The District asserts that plaintiff's claims against it should be dismissed because when Mr. Davis was transferred to NOCC, he no longer was in the custody of the Department of Corrections, but rather was in the custody of the Attorney General. The District bases its argument on D.C. Code § 24-425, which states as follows:

> All prisoners convicted in the District of Columbia for any offense . . . shall be committed, for their terms of imprisonment . . . to the custody of the Attorney General of the United States or [her] authorized representative, who shall designate the places of confinements where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner, or to relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons.

D.C. Code § 24-425.

It is undisputed that the Attorney General has the authority conferred upon her by this statute. *See, e.g.,Cannon v. United States*, 645 F.2d 1128, 1141 & n.53 (D.C. Cir. 1981). Legal custody of a District prisoner "remains in the Attorney General even though the prisoner is assigned to an institution over which the Department of Justice has no control." *Frazier v. United States*, 339 F.2d 745, 746 (D.C. Cir. 1964); *see also Milhouse v. Levi*, 548 F.2d 357, 360-61 (D.C. Cir. 1976) (quoting *Frazier*, 339 F.2d at 746); *McCall v. Swain*, 510 F.2d 167, 179 n.32 (D.C. Cir. 1975) (same). This does not, however, lead ineluctably to the conclusion that the District is not responsible for its conduct toward prisoners convicted of crimes in the District and assigned by the Attorney General to a District prison.

First, "[i]t is well established that legal custody is not co-extensive with physical control over the day-to-day supervision of the prisoner . . . ." *Cannon*, 645 F.2d at 1141 n.53. In *Cannon*, the plaintiff, a federal prisoner held in a District reformatory, filed suit against the United States for injuries sustained allegedly due to the prison guards' failure to protect the plaintiff from his fellow inmates. *See* 645 F.2d at 1130-31. The Court of Appeals for this Circuit rejected plaintiff's claim, concluding "that Cannon sued the wrong government here; it is the District of Columbia, his immediate jailer, from whom he should have sought redress for his injuries allegedly suffered as a result of his jailers' negligence while a prisoner at Lorton." 645 F.2d at 1142. The Court of Appeals noted that the Supreme Court held long ago "that in actions bottomed on negligence, the federal government could not be considered responsible for the

negligence of local prison officials if it lacks physical control over their activities." *Id.* at 1141 n.53 (discussing *Randolph v. Donaldson*, 13 U.S. 76 (1815)). Thus, it does not follow that because Mr. Davis was in the legal custody of the Attorney General, the District may not be sued for its own actions and inactions with respect to Mr. Davis.

Second, the District's attempt to imply that the Attorney General, as a factual matter, had anything to do with Mr. Davis' transfer to NOCC, is rejected. As stated above, in reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the court accepts as true all facts alleged in the complaint, and draws in plaintiff's favor all reasonable factual inferences therefrom. The Complaint alleges that it was the District, not the Attorney General, that orchestrated the transfer to NOCC of District prisoners, including Mr. Davis and Richard Johnson. Plaintiff seeks to hold the District responsible for the actions that it took under its own authority with respect to the prisoners in its control; the Attorney General's unexercised authority over those prisoners is irrelevant.

Third, section 24-425 states that prisoners are committed "to the custody of the Attorney General . . . *or [her] authorized representative.*" D.C. Code § 24-425. In a recent decision, the District of Columbia Court of Appeals, in applying D.C. Code § 24-425, stated that "[t]he District of Columbia Department of Corrections is the authorized representative of the Attorney General." *Harmon v. United States*, 718 A.2d 114, 117 (D.C. 1998). If the Department of Corrections was also acting as the

authorized representative of the Attorney General in this case, then the District certainly cannot escape liability on the basis of section 24-425.

The District argues that the National Capital Revitalization and Self-Government Improvement Act of 1997, D.C. Code § 24-1201 *et seq.* (the "Revitalization Act"), provides further support for its position. Citing D.C. Code §§ 24-1201 (g)(1)(A) and 24-1201(i), the District maintains that, when transferred to NOCC, Mr. Davis "was no longer the responsibility of the District." Def. D.C.'s Mem. Supp. Mot. Dismiss at 4. The District's argument cannot withstand scrutiny.

Section 24-1201(g)(1)(A) states as follows: "to the extent the Bureau of Prisons assumes functions of the Department of Corrections . . . the Department is no longer responsible for such functions and the provisions of §§ 24-441 and 24-442, that apply with respect to such functions are no longer applicable." *Id.* Section § 24-1201(i) states that "[a]s soon as practicable after August 5, 1997, the Director of the Bureau of Prisons shall begin the transferring of inmates to Bureau of Prison or private contract facilities required by this section." *Id.* These provisions do not help the District. They do not indicate when the Bureau of Prisons began to transfer inmates to its own facilities or to private facilities, that Mr. Davis was transferred to NOCC pursuant to the authority of the Bureau of Prisons, or that the Bureau of Prisons had assumed the functions of the Department of Corrections with respect to the transfer, housing, and care of Mr. Davis. The factual allegations in the Complaint, which must be

accepted as true at this stage in the litigation, contradict the factual inferences that the District would have the court draw from the above-referenced provisions.

The District also argues that under D.C Code § 24-442, the District and its Department of Corrections were not responsible for the inmates transferred to NOCC.[2] This argument was made in *Chisley*, a companion case to the one at hand. *See Chisley v. Corrections Corp. of America*, No. 98-7014 (D.C. Sup. Ct. Oct. 6, 1999) (Mem. and Order). In *Chisley*, Judge Joan Zeldon of the District of Columbia Superior Court concluded "that the District cannot delegate to a private entity all of its responsibilities simply because their housing is contracted to an out-of-state facility." *Id.* at 15. This court agrees with Judge Zeldon.

First, generally speaking, the District and the Department of Corrections cannot absolve themselves of their duties to District prisoners simply by contracting for the services of a third party, in this case CCA. As the United States Supreme Court explained in *West v. Atkins*, "Contracting out medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody . . . ." *West v. Atkins*, 487 U.S. 42, 56 (1988). In keeping with *West*, the District of

---

[2] Section 24-442 provides in pertinent part that the "Department of Corrections under the general direction and supervision of the Mayor of the District of Columbia shall have charge of the management and regulation of the Workhouse at Occoquan in the State of Virginia, the Reformatory at Lorton in the State of Virginia, and the Washington Asylum and Jail, and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institutions." D.C. Code § 24-442.

Columbia Court of Appeals has recognized that the District may not avoid its *Eighth Amendment* obligations to its prisoners by delegation to an independent contractor, but has held that the District may fulfill its *statutory* obligations to its prisoners "by exercising reasonable care in the selection and supervision of its independent contractors." *Herbert v. District of Columbia*, 716 A.2d 196, 200-01 (D.C. 1998). The Complaint alleges that the District and the Department of Corrections failed to supervise CCA's operation of the Ohio facility. Compl. at 8. Thus, even under this more lenient standard, plaintiff states a claim upon which relief may be granted.

Second, the mere fact that defendants contracted for the provision of *housing*, as distinguished from services such as medical care, does not relieve defendants of their duties toward District prisoners. The Court of Appeals for this Circuit has interpreted D.C. Code section 24-425 as imposing upon the District "the primary responsibility for housing locally-convicted prisoners." *United States v. District of Columbia*, 897 F.2d 1152, 1155-56 (D.C. Cir. 1990). Mr. Davis was held in a facility listed in section 24-442 prior to being transferred to NOCC. Thus, the District and Department of Corrections were "responsible for the safekeeping, care, protection, instruction, and discipline of" Mr. Davis. D.C. Code § 24-442. Defendant's argument that, once transferred to CCA, the District and the Department of Corrections had no responsibility toward Mr. Davis is untenable because it proves too much. If defendant's proposition were true, it would mean that the District and the Department of Corrections would not be legally accountable if they were to do nothing upon

learning that District prisoners entrusted to CCA's care were being denied food, water, or medical care.

Finally, theoretical arguments about the Attorney General's legal custody aside, the facts alleged in the Complaint make clear that Mr. Davis was imprisoned at NOCC under the coercive power of the District of Columbia, not the federal government. The District of Columbia cannot be allowed to abandon its inmates to a private company if it is aware of a significant risk of serious harm to those inmates. The court concludes that the provisions cited by the District do not absolve it of its responsibility to Mr. Davis.

2. Section 1983

The District next argues that plaintiff fails to state a claim against it under section 1983 because plaintiff "failed to allege that Mr. Davis' claimed constitutional harm 'was *caused* by a policy statement, ordinance, regulation, or decision promulgated or adopted by [the District].'" D.C. Mem. Support Mot. Dismiss at 5 (quoting *Miller v. Barry*, 698 F.2d 1259, 1261 (D.C. Cir. 1983)) (internal quotation marks omitted) (emphasis in original). Defendant's legal premise that a municipality such as the District may not be sued under section 1983 unless "execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury" is correct. *Id.* at 4 (quoting *Monell v. Dep't of Social Serv. of New York*, 436 U.S. 658, 694 (1978)); *see also Dorman v. District of Columbia*, 888 F.2d 159, 162 (D.C. Cir. 1989); *Morgan v. District of Columbia*,

824 F.2d 1049, 1058 (D.C. Cir. 1987). A municipality may not be held liable on a respondeat superior theory. *See, e.g., Leatherman v. Tarrant County Narcotics Intell. and Coordin. Unit*, 507 U.S. 163, 166 (1993).

However, plaintiff did, in fact, allege that "*[t]he injuries suffered by Mr. Davis . . . resulted from* the reckless and callous indifference to the rights of Mr. Davis and the willful, wanton and/or malicious misconduct of the Defendants, including *the ongoing customs, policies and practices of the Defendants* respecting the incarceration of prisoners at the Ohio Center." Complaint ¶ 40 (emphasis added). Accepting the allegations in the Complaint as true, and drawing all reasonable inferences in plaintiff's favor, as the court must on a motion to dismiss, the court finds that the Complaint asserts that the District engaged in a policy of inaction or deliberate indifference to the well-being of the District inmates housed at NOCC. Consequently, plaintiff's allegations are sufficient to withstand a motion to dismiss for failure to state a claim.[3]

3. Supplemental Jurisdiction

---

[3] There is no heightened pleading requirement with respect to allegations against municipalities under section 1983. *See, e.g., Leatherman v. Tarrant County Narcotics Intell. and Coordin. Unit*, 507 U.S. 163, 164 (1993) (holding that a federal court may not establish "a 'heightened pleading standard'--more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure--in civil rights cases alleging municipal liability under [section] 1983."); *see also Atchinson v. District of Columbia*, 73 F.3d 418, 421-23 (D.C. Cir. 1986) (applying *Leatherman* standard).

The District argues finally that plaintiff's section 1983 claim is substantively weak, and that the court therefore should decline to exercise supplemental jurisdiction over plaintiff's related state law claims. The District does not contend that the court lacks jurisdiction over these matters, however. As discussed above, the court has found plaintiff's section 1983 claim strong enough to withstand the District's motion to dismiss. Because the court has not been provided any other reason to decline supplemental jurisdiction of plaintiff's related state law claims, and because considerations of judicial economy weigh in favor of resolving this case in one forum, this court will entertain plaintiff's state law claims.

B. Margaret Moore's Motion to Dismiss

1. Section 1983

Ms. Moore alleges that plaintiff fails to state a claim under section 1983 for violations of the Eighth, Fifth, and Fourteenth Amendments. As plaintiff has abandoned her Fifth and Fourteenth Amendment claims, the court will consider only whether plaintiff states a claim for violation of the Eighth Amendment. As the United States Supreme Court explained in *Farmer v. Brennan*, "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." 511 U.S. 825, 828. To establish that the official acted with "deliberate indifference," a plaintiff must show "that the official was subjectively aware of the risk." *Id.*

Plaintiff has stated a claim under both elements of this test. First, plaintiff has alleged facts from which it would be reasonable to infer that Mr. Davis was subjected to a substantial risk of serious harm. Although Mr. Davis was a medium security prisoner, he was incarcerated with extremely violent, maximum-security prisoners. The Complaint alleges that Ms. Moore's decisions regarding the transfer of prisoners to NOCC largely created, and did nothing to abate, this situation. Among the violent prisoners that were transferred was Richard Johnson, an inmate with a clearly established history of violent conduct against other inmates.

Second, the allegations in the Complaint, taken as true for the purposes of a motion to dismiss, establish deliberate indifference to this risk of harm. In *Farmer*, the Supreme Court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." 511 U.S. at 847. The Complaint alleges that defendants, including Ms. Moore, knew of the substantial risk to the safety of the inmates at NOCC, and yet did nothing to abate it. To the contrary, according to the Complaint, Ms. Moore exacerbated the situation by repeatedly transferring highly dangerous prisoners to NOCC. Plaintiff has thus made sufficient allegations to establish deliberate indifference to a substantial risk of serious harm.

Thus, the Complaint states a claim for violation of the Eighth Amendment, and Ms. Moore's motion to dismiss plaintiff's section 1983 claim against her in her official capacity will be denied.[4]

2. Qualified Immunity

Defendant Moore argues that she is entitled to qualified immunity from plaintiff's section 1983 claim against her in her individual capacity. Qualified immunity "is an immunity from suit rather than a mere defense to liability . . ."; thus, questions of immunity should be resolved "at the earliest possible stage of the litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). The legal standard that the Supreme Court of the United States has established for determining whether officials are entitled to qualified immunity is as follows: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Crawford-El v. Britton*, 118 S.Ct. 1584, 1592 (1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)); *see also Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998).[5]

---

[4] Ms. Moore seeks dismissal of the claims against her on several grounds. One ground for dismissal is that she owed no duty to Mr. Davis after his transfer to NOCC. This argument is rejected for the reasons discussed above. See Part III.A.1, *supra*.

[5] This is an objective standard: "[e]vidence concerning the defendant's subjective intent is simply irrelevant" to the defense of qualified immunity, even if such evidence is an essential element of plaintiff's affirmative case. *Crawford-El*, 118 S.Ct. at 1592. Thus, in this case, although the question whether defendant acted with

Applying this standard to the present case, the court first considers whether Ms. Moore's conduct was "discretionary." *Id.* As the Court of Appeals for this Circuit has explained, "[t]he courts generally define 'discretionary' acts as those involved in the formulation of policy, while 'ministerial' acts are defined as those related to the execution of policy." *Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C. Cir. 1977), *vacated but reinstated in pertinent part on rehearing*, 580 F.2d 647 (D.C. Cir. 1978)). Subject only to the general guidance and approval of the Mayor and the City Council, Ms. Moore formulated policy for the treatment and care of the inmates of the District of Columbia. *See* D.C. Code §§ 24-441 and 24-442. The parties have cited no statute or regulation, and the court is aware of none, that specifically prescribed or proscribed Ms. Moore's alleged singling out for transfer to the Ohio facility particularly dangerous District of Columbia inmates. Complaint ¶¶ 23-25, 27; *Cf. Davis v. Scherber*, 468 U.S. 183, 196 n.14 (1984) ("A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority . . . ."); *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997) ("To determine whether a function is discretionary, . . . we ask whether any 'statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'") (quoting Federal Tort Claims Act cases) (citations omitted). Assuming

---

"deliberate indifference" is relevant to whether defendant, if not immune to suit, may be held liable under section 1983, questions concerning defendant's state of mind are not relevant to the initial question whether defendant is entitled to qualified immunity.

the facts in the Complaint to be true, the court finds that Ms. Moore's conduct was not strictly governed by law but rather the product of judgments of the type that "almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Thus, Ms. Moore's conduct was discretionary.

The court next turns to the question whether Ms. Moore's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Crawford-El,* 118 S.Ct. at 1592 (quoting *Harlow*, 457 U.S. at 817-18); *see also id.* at 1597. Whether a statutory or constitutional right was clearly established at the time of the official's conduct is "an 'essentially legal question.'" *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526-29 (1985)); *see also Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998) (quoting *Mitchell*). In examining this question, the Supreme Court has made clear that the level of generality at which the right is described is important. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). It is not enough simply to allege the violation of a clearly established but conceptually broad right, such as the right to Due Process, *see id.*, or, in this case, the right to be free from cruel and unusual punishment. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640; *see also Harris v. District of Columbia*, 932 F. 2d 10, 13 (D.C. Cir. 1991)

(quoting *Anderson*, 483 U.S. at 640). As the Court of Appeals for this Circuit has explained, "Government officials who violate a plaintiff's civil rights are entitled to qualified immunity if the officials reasonably could have believed that their actions were lawful in light of clearly established federal law and the information available to them at the time the actions took place." *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C. Cir. 1997) (citing *Anderson*, 483 U.S. at 641).

Although the court has today held that the duties established by the Eighth Amendment and D.C. Code § 24-442 extend to District prisoners who are transferred out of enumerated prisons pursuant to a private contract, that duty was not clearly established at the time that Ms. Moore acted. An officer acting at that time could have reasonably, but incorrectly, believed that the Eighth Amendment duty to provide humane conditions of confinement applied only to prison officials directly responsible for managing the prisons in which the inmates were housed, and that the Eighth Amendment imposed no duty upon officials whose prisoners had been transferred to the physical control of a private entity. Thus, a reasonable official in Ms. Moore's situation could have believed her conduct did not violate the Eighth Amendment. Since Moore's conduct did not violate a clearly established law of which a reasonable official would have known, she is entitled to qualified immunity from plaintiff's section 1983 claim.

3. Absolute Immunity

Ms. Moore also claims absolute immunity, in her individual capacity, from plaintiff's common law claims. Under District law, "[a]bsolute immunity is available when the official acted within the outer perimeter of his official duties in the exercise of a discretionary, as opposed to ministerial, function." *Durso v. Taylor*, 624 A.2d 449, 458 (D.C. 1993).

Ms. Moore's conduct in the instant case was discretionary. See qualified immunity discussion, Part III.B.3, *supra*.[6] It is undisputed that Ms. Moore acted within the outer perimeter of her duties. Thus, Ms. Moore is entitled to absolute immunity in her individual capacity from plaintiff's common law tort claims, and those claims are dismissed.

4. Sovereign Immunity

---

[6] The court has considered whether the four policy factors *District of Columbia v. Thompson* should alter its analysis in Part III.B.3, *supra*. *See District of Columbia v. Thompson*, 570 A.2d 277, 297 (D.C. 1990) (citation omitted), *vacated on other grounds*, 593 A.2d 621 (1991). In *Thompson*, the District of Columbia Court of Appeals established four policy factors that a court may consider in determining whether to rule that particular conduct is discretionary: "(1) the nature of the plaintiff's injury; (2) the availability of alternative remedies; (3) the ability of the courts to judge fault without unduly invading the executive's function, and (4) the importance of protecting particular kinds of official acts." *Id.* As an initial matter, the court is not convinced that it is the law in the District of Columbia that the *Thompson* factors must be considered in determining whether an official is immune from tort liability. *Cf. Durso v. Taylor*, 624 A.2d 449 (D.C. 1993) (determining that defendant was immune from tort suit without mentioning *Thompson*). Even if the court were to apply the *Thompson* factors, the court's conclusion that Ms. Moore exercised discretion would not change. Although the first factor weighs in plaintiff's favor, as plaintiff's injury was unquestionably severe, the other three factors weigh in defendant's favor.

Ms. Moore further claims sovereign immunity, in her official capacity, from plaintiff's common law claims. A District officer is "protected by sovereign immunity if the officer's acts are 'discretionary,' but subject to liability if the acts were 'ministerial' in character." *Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C. Cir. 1977), *vacated but reinstated in pertinent part on rehearing*, 580 F.2d 647 (D.C. Cir. 1978); *see also Durso v. Taylor*, 624 A.2d 449, 458 ("In the District of Columbia the doctrine of sovereign immunity protects an official from suits for acts committed in the exercise of a discretionary function.").

As discussed above, Ms. Moore's conduct was discretionary. See Parts III.B.3 and III.B.4, *supra*. Thus, Ms. Moore is entitled to sovereign immunity in her official capacity from plaintiff's common law tort claims, and those claims against Ms. Moore in her official capacity are dismissed.

C. CCA's Motion to Dismiss

1. Standing

CCA argues that plaintiff lacks standing in her individual capacity to bring any of the claims enumerated in the Complaint. CCA does not dispute that plaintiff has standing to bring those claims in her capacity as personal representative of Mr. Davis' estate. Plaintiff responds that although the amended Complaint states that plaintiff sues "individually," what it means is that she sues as next best friend of her daughter, London Davis, Mr. Davis' sole heir. Plaintiff claims that she only sues "individually" in the sense that she has stepped into her daughter's shoes. CCA responds that even if

"individually" is to be interpreted in this manner, Mr. Davis' daughter's claims are duplicative of the claims brought by Mr. Davis' estate, and thus should be dismissed. CCA is correct: plaintiff lacks standing to sue in her individual capacity. Plaintiff's claims in her individual capacity will therefore be dismissed.

2. Fifth and Fourteenth Amendments

CCA argues that plaintiff's claims under the Fifth and Fourteenth Amendments (as predicates to section 1983 liability) should be dismissed with prejudice since plaintiff abandoned those claims in its opposition to CCA's motion to dismiss. *See* Pl. Mem. Opp. CCA's M. Dismiss at 1 n.1. Plaintiff's Fifth Amendment and Fourteenth Amendment claims were only mentioned in the section 1983 context, *see* Complaint ¶ 37, and the section 1983 claim survives on the strength of the alleged Eighth Amendment violation. The court will dismiss the Fifth and Fourteenth Amendment elements of plaintiff's section 1983 claim.

3. Survival Act

CCA argues that plaintiff's Survival Act claim should be dismissed because the Survival Act does not create a cause of action. Plaintiff responds that the Survival Act creates a cause of action; it simply does not create a *new* cause of action. In its reply, CCA contends that that is what it meant all along: the Survival Act count should be dismissed because the Survival Act does not create a *new* cause of action.

This is a meaningless debate. CCA does not dispute that the Survival Act allows plaintiff, as representative of Mr. Davis' estate, to bring the claims that Mr.

Davis would have had if he had not died. Plaintiff does not allege that the Survival Act allows her any additional recovery; it merely allows her to sue in Mr. Davis' stead. CCA's motion to dismiss plaintiff's Survival Act claim is denied.

D. CCA's Alternative Motion to Transfer

CCA moves to transfer this case to the Northern District of Ohio pursuant to 28 U.S.C. § 1404(a).[7] Section 1404(a) provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Applying section 1404(a), the court first considers whether the district to which defendants move to transfer this action is one "where it might have been brought." 28 U.S.C. § 1404(a). CCA, which bears the burden of justifying transfer, *see, e.g, Trout Unlimited v. United States Dep't of Agric.*, 944 F. Supp. 13 (D.D.C. 1996), has provided no analysis to support the conclusion that this case could have been brought in the Northern District of Ohio. Although the court could deny CCA's motion on this basis alone, the court will instead assume for the sake of argument that this case could have been brought in that district, and proceed with its analysis.

Under section 1404(a), the court must next consider whether transferring the case would serve the "convenience of parties and witnesses" or "the interest of justice."

---

[7] CCA's alternative motion to transfer is joined by Margaret Moore and the District.

Id. In making this determination, the "court must give due regard to the factors traditionally associated with the doctrine of forum non conveniens . . . ." *In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983).[8] The first set of factors typically considered in ruling on a forum non conveniens motion are "private interest" factors, which are to be weighed with "a strong presumption against disturbing plaintiffs' initial forum choice." *Friends For All Children, Inc. v. Lockheed Aircraft Corporation*, 717 F.2d 602, 606 (D.C. Cir. 1983) (quoting *Pain v. United Technologies Corp.*, 637 F.2d 775, 784-85 (D.C. Cir. 1980)).[9] In evaluating the private factors relevant to a motion for change of venue, the court must "'weigh relative advantages and obstacles to fair trial' in alternative forums, paying special heed to the 'practical problems that make trial of a case easy, expeditious, and inexpensive.'" *Pain*, 637 F. 2d at 786 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

---

[8] Although the court recognizes that such factors are relevant to its inquiry, and will consider them in making its determination, the court also recognizes that it has broader discretion under section 1404(a) than it would under the doctrine of forum non conveniens. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The court further recognizes that a section 1404(a) "transfer is available 'upon a lesser showing of inconvenience' than that required for a forum non conveniens dismissal." *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149 (D.C. Cir. 1978) (quoting *Norwood*, 349 U.S. at 32).

[9] The court has discounted the weight that would be afforded plaintiff's choice of forum under the forum non conveniens doctrine, but it has recognized that even under section 1404(a), "[t]here can be no doubt that a plaintiff's choice of forum is entitled to at least some weight." *Id.*; *see also Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998) (ruling on a section 1404(a) motion to transfer and stating that "[i]n order to succeed on their motion, defendants have the heavy burden of establishing that plaintiff's choice of forum is inappropriate.").

In particular, courts have found the following considerations relevant:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.

Friends For All Children, 717 F.2d at 607 (quoting *Pain*, 637 F.2d at 782 (in turn quoting *Gilbert*, 330 U.S. at 508)); *see also Nalls v. Rolls-Royce Ltd.*, 702 F.2d 255, 256 (D.C. Cir. 1983).

In this case, assigning due weight to plaintiff's choice of forum, the court finds that the private factors do not weigh in favor of transfer. First, documents and testimony are the likely "sources of proof" in this case. CCA claims that "[a]ll pertinent documents and files are located at the NEOCC facility in Youngstown." CCA Mem. Supp. Mot. Transfer at 14. In contrast, plaintiff claims that "virtually all of the documents relating to this case are, by contract, here in the District of Columbia . . . ." Pl. Mem. Opp. Mot. Transfer at 8. As for testimony, which also implicates the next private factor to be considered, CCA argues that "nearly all of the material witnesses reside in the Youngstown, Ohio, area" and that "[t]he majority of material witnesses in this case are well beyond the subpoena power of this Court." CCA Mem. Supp. Mot. Transfer at 14. Plaintiff points out that "all of the D.C. officials responsible for the

contract's implementation are in the District of Columbia . . . ." Pl. Mem. Opp. Mot. Transfer at 8.

After considering the parties' arguments relating to witness convenience, the court concludes that transferring the case would not eliminate potential problems, as District witnesses would then have to travel to Ohio. To the extent that Ohio witnesses are truly beyond this court's subpoena power, District witnesses would be beyond the Ohio court's subpoena power. The attendant costs of travel would presumably be the same per person regardless of the point of origin of the Ohio--District of Columbia round-trip ticket. Overall costs might be higher if the litigation were to proceed here, assuming that more witnesses might have to travel for trial, but defendants have not carried their burden of establishing that this would be the case. Neither party has argued that it is important that the court or jury be able to "take a view." Neither party presents any evidence that CCA or Margaret Moore will be denied a fair trial in the District of Columbia. In short, although witness convenience might weigh slightly in defendants' favor, it does not tip the scales in favor of transfer, given that plaintiff's choice of her home forum is "due substantial deference,"[10] especially where "plaintiff is a resident of the chosen forum and the activities forming the basis of the suit have a

---

[10] Recent formulations of the private interest test have also given defendant's choice of forum some weight, although not as much as plaintiff's choice of forum. *See, e.g., Hazard*, 24 F. Supp. 2d at 71. Since two of the defendants, the District and the Director of the Department of Corrections, are local, the court does not find the notion that these defendants would be inconvenienced by litigating the case in the District particularly compelling.

significant connection with the forum." *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998).

In addition to the private interest factors that favor retaining the suit in this jurisdiction, factors of public interest also weigh in favor of having this case tried in the District of Columbia. The Court of Appeals for this Circuit explained in *Pain*, "the central question which a court must answer when weighing the public interests in the outcome and administration of a case such as this is whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." *Pain*, 637 F.2d at 791. In making this determination, it is appropriate for a district court to consider three factors:

> [F]irst, that courts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it; second, that courts may legitimately encourage trial of controversies in the localities in which they arise; and third, that a court may validly consider its familiarity with governing law when deciding whether or not to retain jurisdiction over a case.

Friends For All Children, 717 F.2d at 609 (quoting *Pain*, 637 F.2d at 791-92).

There is no showing that any of the three public factors weighs in favor of transfer. The first factor, which has been construed as calling for a comparison as to the relative congestion of the potential transferor and transferee courts' dockets,[11] cannot be weighed because neither party has provided any information about the

---

[11] *See, e.g., Trout Unlimited v. Department of Agriculture*, 944 F. Supp. 13, 16 (D.D.C. 1996).

relative congestion of the Ohio court's docket. *See* Pl. Mem. Opp. Mot. Transfer at 12. The second factor also does not weigh in favor of transfer: many of the events giving rise to the present controversy occurred in the District; this case involves the treatment of a District resident given to the custody and care of the Department of Corrections; and two of the three defendants are the District and the former Director of the Department of Corrections. The third factor, familiarity with the governing law, also does not weigh in favor of transfer: this court is familiar with the federal standards governing section 1983 actions predicated upon alleged Eighth Amendment violations; the contract between CCA and the District is to be interpreted under District of Columbia law; the District of Columbia Survival Act claim calls for interpretation of District of Columbia law; and even if plaintiff's common law tort claims are to be analyzed under Ohio law, defendants have been unable to identify any difference between the common law of torts in Ohio and the common law of torts in the District.

After considering the private and public factors applicable to a forum non conveniens analysis, and weighing them in accordance with the principles of section 1404(a), the court concludes that transferring the case would serve neither "the convenience of parties and witnesses" nor "the interest of justice." 28 U.S.C. § 1404(a). Thus, even assuming that plaintiff might have brought suit in the Northern District of Ohio, the court will not exercise its broad discretion under section 1404(a) to transfer the case. CCA's motion to transfer is denied.

IV. CONCLUSION

For the foregoing reasons, it is this 22nd day of November, 1999, hereby

ORDERED that CCA's motion to transfer is **DENIED**; and it is further

ORDERED that defendant District of Columbia's motion to dismiss is **DENIED**; and it is further

ORDERED that defendant Margaret Moore's motion to dismiss plaintiff's common law claims against her in her individual and official capacities is **GRANTED**; and it is further

ORDERED that defendant Margaret Moore's motion to dismiss plaintiff's section 1983 claim against her in her individual capacity is **GRANTED**; and it is further

ORDERED that defendant Margaret Moore's motion to dismiss plaintiff's section 1983 claim against her in her official capacity is **DENIED**; and it is further

ORDERED that defendant CCA's motion to dismiss plaintiff's claims in her individual capacity is **GRANTED**; and it is further

ORDERED that defendant CCA's motion to dismiss the Fifth and Fourteenth Amendment predicates to plaintiff's section 1983 claim is **GRANTED**; and it is further

ORDERED that defendant CCA's motion to dismiss is, in all other respects, **DENIED**.

_____

Henry H. Kennedy, Jr.

United States District Judge